NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Crim. No. 1997-72**
	)	
AUBREY ERNEST BOONE,	)	
	)	
Defendant.	)	
	)	

ATTORNEYS:

Patricia Schrader-Cooke, Esq.
Assistant Federal Public Defender
St. Thomas, U.S.V.I.
For the plaintiff,

Nelson L. Jones, Esq.
Assistant United States Attorney
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

On December 10, 1997, defendant Aubrey Ernest Boone ["Boone"] was convicted of possession of cocaine aboard an aircraft arriving in the United States, importation of cocaine, and possession of a controlled substance with intent to distribute.[1] (*See* Def.'s Corrected Mot. at 1-2.) Currently before the Court is the defendant's motion for a judgment of acquittal or new trial pursuant to Federal Rules of Criminal

[1] See sections 955, 952(a), and 841(a)(1) of Title 21, United States Code, respectively.

Procedure 29(a) and 33.[2] For the following reasons, his motion will be denied.

FACTUAL SUMMARY

The government presented testimony and evidence at trial that Boone arrived in St. Thomas, United States Virgin Islands, from St. Kitts on board Liat Airlines Flight 540 on May 23, 1997. (*See* Government's Resp. at 3 (citing testimony of Liat Airlines Supervisor Lynette Gumbs).) Agriculture Inspector Karen Stewart ["Stewart"] testified that the defendant presented two cardboard boxes for inspection at customs. As she prepared to open the second box, the defendant took her pen and jabbed at the box in an attempt to open it. While searching the box, Stewart felt an object inside and asked Boone what it was. According to Stewart, Boone replied, "help me." Stewart asked him to repeat himself, and the defendant repeated, "help me." Stewart immediately turned the defendant over to Customs Inspector Carolyn Brown ["Brown"].

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[2] The Federal Rules of Criminal Procedure apply to all criminal proceedings in the District Court of the Virgin Islands. *See* FED. R. CRIM. P. 54(a).

Boone's motion was timely because the Court granted him additional time to file with the instruction that he "shall file all post trial motions not later than ten (10) days following receipt of jury selection and trial transcripts." (*See* Order of Dec. 18, 1997.) Several months later, the defendant notified the Court that he had received the required transcripts on April 7, 1998. (*See* Notice of April 8, 1998.) Finally, on April 22, Boone filed the motion now before the Court. His motion fell within the allotted ten-day period because one of the intervening days, April 10th, Good Friday, is recognized as a government holiday in the Virgin Islands. *See* FED. R. CRIM. P. 45.

Brown testified that Boone admitted that he had presented the box for inspection, but it contained fish belonging to a man named Brooks whom he did not know personally. Brown then examined the contents of the box and found a brick-shaped object encased in a clear plastic bag. She performed a field test on the brick, which tested positive for cocaine.

Brown's testimony was bolstered by Customs Inspector Hillary Hodge, Jr. [“Hodge”], who testified that he saw the brick-shaped object in Boone's box. He further noted that the baggage tag attached to the box matched the tag included with the defendant's ticket.

Customs Special Agent Joseph Schwartz ["Schwartz"] testified that he took Boone into custody and carefully advised him of his rights. Boone acknowledged the *Miranda* warnings by initialing each sentence in a printed set of warnings. He denied knowing that the second box presented for inspection contained cocaine.

The next morning, May 24, 1997, Schwartz took Boone to court for his initial appearance. Schwartz testified that he asked the defendant whether he remembered acknowledging the Miranda warnings. Boone indicated that he remembered his rights and did not want an attorney. According to Schwartz, Boone first denied knowledge of the cocaine in the box. Schwartz then made sympathetic remarks to the defendant, who grew quiet, and finally

admitted that the box contained cocaine. Schwartz testified that he secured the cocaine in a tamper-evident safe at Customs in the St. Thomas airport until June 2, 1997, when he ascertained that the safe had not been disturbed and turned the evidence over to Customs Service Seized Property Custodian Norma Smith ["Smith"].

At trial, Smith testified that she stored the cocaine seized from Boone in the Customs Service evidence vault until trial. Drug Enforcement Administration Chemist Raoul Morales testified that four samples from this evidence tested positive for cocaine hydrochloride, a controlled substance. The net weight of the cocaine was 3,954 grams. In limine, Morales testified that he examined portions of Boone's pants with a gas chromatography mass spectrometer but found no traces of cocaine. He acknowledged that an INS microscan performed by Hodge did reveal cocaine traces. Although the government did not introduce the results of the test performed by Hodge, the Court ruled that the defense could introduce the test results obtained by Morales.

The defense called four witnesses, among them Customs Inspector Murray David ["David"] and Boone. The defense attempted to elicit testimony from David that the Customs Service had a systemic bias against the Federal Public Defender's Office. The government objected to this testimony as irrelevant to the issues in the case, and the Court sustained the objection.

Boone testified that he obtained the box from a stranger in St. Kitts and brought it to St. Thomas as a favor, assuming that the recipient would identify himself at the airport. He denied telling Schwartz that he knew that the box contained cocaine. Later that day, the jury convicted Boone on all counts.

DISCUSSION

As Boone challenges his conviction on six grounds, the Court will consider each of his contentions separately.

I. Sufficiency of the Evidence

Invoking Federal Rule of Criminal Procedure 29(a), Boone argues that the evidence presented by the government was insufficient to convict him because "the evidence was uncontradicted that [he] brought the box for another individual and . . . [he] maintained that he had no knowledge that there was cocaine in the box." He asserts that Schwartz's recitation of his alleged confession was "less than credible," and claims that the government failed to establish a proper chain of custody because Smith did not know personally who had examined the evidence on November 25, 1997. (*See* Def.'s Corrected Mot. at 13.)

In reviewing Boone's argument for a judgment of acquittal,

this Court must determine whether there was substantial evidence upon which a reasonable jury could have based its verdict. *See United States v. Obialo*, 23 F.3d 69, 72 (3d Cir. 1994). The Court must view the evidence in the light most favorable to the government and draw all reasonable inferences therefrom in the prosecution's favor. *See United States v. Forde*, No. 97-7469, slip. op. at 5 (3d Cir. Nov. 6, 1998). Boone faced counts of cocaine possession aboard an aircraft arriving in the United States, importation of cocaine, and possession of a controlled substance with intent to distribute. To convict the defendant on these charges, the government had to prove that Boone knowingly possessed a controlled substance and intentionally imported it into the United States by air in order to distribute it. (*See* 21 U.S.C. §§ 955, 952(a), 841(a)(1); *see also* Jury Charge at 19-21 (identifying elements of charged offenses)).

The testimony and evidence presented by the government gave the jury ample reason to conclude beyond a reasonable doubt that Boone knowingly and intentionally possessed and transported the contraband by air to St. Thomas. Schwartz's recital of Boone's alleged confession contradicted the defendant's testimony. The Court cannot usurp the jury's function and weigh Schwartz's credibility, as defendant suggests, in judging the merits of his motion for acquittal. *See Burks v. United States*, 437 U.S. 1, 16

(1978). Although Boone identified a possible weak link in the government's chain of custody for the cocaine allegedly taken from him, the jury was entitled to consider the authenticity of the evidence. Smith was one of two authorized custodians for evidence obtained by the Customs Service; her inability to account for a single examination hardly obviates the possibility that the evidence was cocaine. Indeed, the defendant did not even allege that the cocaine left the custody of the authorized custodians. *See United States v. Jackson*, 649 F.2d 967 (3d Cir. 1981) (declaring that "evidence is admissible if the trial judge determines that 'there is a reasonable probability that the evidence has not been altered in any material respect since the time of the crime'") (citation omitted). The Court will not overturn the verdict for lack of evidence because a reasonable jury could have found Boone guilty beyond a reasonable doubt on all charges. *See United States v. Menon*, 24 F.3d 550, 564 (3d Cir. 1994) (citation omitted).

II. Burden of Proof

The defendant supplements his motion for acquittal with a motion for a new trial under Federal Rule of Criminal Procedure 33, which provides that "[t]he court . . . may grant a new trial to [a] defendant if required in the interest of justice." *See* FED. R. CRIM. P. 33. Unlike the standard for judgment of

acquittal under Rule 29, the Court may consider the evidence or credibility of witnesses in assessing whether justice has miscarried. *See United States v. Bevans*, 728 F. Supp. 340, 343 (E.D. Pa.), *aff'd*, 914 F.2d 244 (3d Cir. 1990). It remains the defendant's burden, however, to show that the Court committed error in the course of his trial. *E.g. United States v. Clovis*, Crim. No. 94-011, Div. St. Thomas & St. John, CD-ROM (D.V.I. Feb. 12, 1996) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 551 (1982)).

Boone contends that the government impermissibly shifted the burden of proof to him by stating in its closing argument that, "Mr. Aubrey Boone knows the only way he cannot be found guilty is if he convinces you that he didn't have the cocaine in the box. That is why he took the stand and told you he didn't know there was cocaine in this box." (*See* Trial Tr., Dec. 10, 1997, at 133). The Court cannot find that the jury was misled by this statement. The defendant's argument takes the prosecutor's words out of the context in which the jury heard them. The very next sentence--indeed, the last sentence--of the government's closing argument was:

> But there is no question that when you look at all the evidence in this case, when you look at all the evidence in this case, and all the facts that have been presented to you, and all the circumstances of this case as testified to by the [g]overnment and testified to by Mr. Boone, you will find the Government has met

> each and every element required under Counts One, Two, and Three, and I will ask you to return a verdict of guilty on all three counts.

(*Id.*) The prosecutor clearly stated that the government must prove the required elements of the charges against Boone. A reasonable person would have understood that the prosecutor was characterizing Boone's testimony and case by explaining, "[t]hat is why he took the stand." If any doubt lingered in the jurors' minds, the Court immediately dispelled that uncertainty by issuing the following curative instruction:

> Ladies and gentlemen, [l]et me make one comment and that is—-that I will repeat to you. You have already heard several times the burden of proof never shifts to the defendant. It doesn't have--defendant doesn't have to do anything. It is the [g]overnment's burden to prove all the elements and guilt beyond a reasonable doubt.

(*Id.* at 135.) The Court finds that the prosecutor's comment did not shift the burden to the defendant.

III. Abuse of Discretion

Boone claims that the Court abused its discretion in ruling that he could not obtain testimony from David concerning the Customs Service's failure to cooperate with, or systemic bias against, the Federal Public Defender's Office. The Court upheld the government's objection because this line of questioning was not relevant to the present case. The defendant asserts that "[t]his evidence was clearly relevant as is evidence of bias of

any witness." (*See* Def.'s Corrected Mot. at 17.) Evidence of personal bias is, of course, crucial in evaluating the credibility of any witness. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 6.05[A] (3d ed. 1996). Boone's line of questioning, however, was directed at an administrative problem or misplaced directive within the Customs Service. As the defendant's counsel explained, this testimony would only "point to the jury . . . the rather systemic bias that Customs has, that they were not independent here. They are not an independent agency just seeking the truth in justice here." (Trial Tr., Dec. 10, 1997, at 17.) It would not have disclosed any bias on the witness' part. Indeed, David was cooperative with the defendant's investigator before trial. (*See id.* at 15 ("Mr. David set up a meeting with . . . my investigator.") (statement of defendant's counsel).) The Court correctly excluded this non-probative testimony from trial.

IV. Right of Confrontation

Boone next complains that the Court "obliterated" his constitutional right to confront Morales, the DEA chemist, by ruling that questioning him about the negative test result for cocaine traces obtained from the gas chromatography mass spectrometer would render the positive INS scan result admissible. His attorney "elected not to have the damaging

testimony concerning the [positive test] presented to the jury and restricted her cross-examination." (Def.'s Corrected Mot. at 18.) Boone strenuously questioned Morales about the test performed on the evidence seized at the airport. His counsel's tactical decision to inquire no further did not violate his constitutional rights. The confrontation clause safeguards the right to effect cross-examination, not the right to effective cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination*.") (citations and internal quotation marks omitted) (emphasis in original). The defendant's argument is patently without merit.

V. Denial of Motions to Dismiss, Exclude, or Suppress

Boone maintains that the Court erred in denying his pre-trial motions to dismiss the case or, in the alternative, exclude or suppress his statements to Stewart, Brown, and Schwartz based on the government's tardy disclosure and Customs' alleged failure to advise him of his rights. He seeks a judgment of acquittal on these grounds. (*See* Def.'s Corrected Mot. at 18.) "The sole foundation upon which a judgment of acquittal should be based is a successful challenge to the sufficiency of the Government's evidence." *United States v. Frumento*, 426 F. Supp. 797 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977) (citation omitted).

The Court will construe the defendant's argument as seeking a new trial under Rule 33.

Reviewing the challenged evidentiary rulings, the Court is satisfied that the interests of justice were served by admitting Boone's statements. Although the government did not disclose the evidence until November 21, 1997, less than two weeks before the original trial date, it appeared that this delay was occasioned by neglect on the prosecutor's part. The Court declined to exclude or suppress the evidence or dismiss the case because the government did not act in bad faith and the defendant was not materially prejudiced in the preparation of his defense. Boone received a short continuance to allow his counsel to examine the statements. (*See* Tr., Nov. 24, 1997, at 18-19.) Boone's counsel complained that a plea offer had expired before the government disclosed this evidence. In response to the Court's request, the government renewed its offer. (*See* Tr., Dec. 4, 1997, at 93-96.) The Court made certain that the defendant did not lose any opportunities due to the government's sloth.

Likewise, the Court finds no error in the determination that Boone's statements to Brown, Stewart, and Schwartz were lawfully obtained. Boone argues that Stewart or Brown should have administered *Miranda* warnings before speaking to him on May 23, 1997. The evidence adduced at trial matched the facts presented

at the suppression hearing. Boone spoke to Stewart and Brown at a border crossing before the cocaine was discovered in the box presented for inspection. Although he was questioned by customs personnel and "deprived of his freedom of action in . . . [a] significant way," see *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), Boone was not entitled to an advise of rights because routine border interrogations do not trigger *Miranda* warnings, at least not until the questioning agents have probable cause to arrest. *See United States v. Douglas*, 29 V.I. 175 (D.V.I. 1994); *see also United States v. Layne*, 973 F.2d 1417, 1420 (8th Cir. 1992); *United States v. Berisha*, 925 F.2d 791, 797 (5th Cir. 1991); *United States v. Garcia*, 905 F.2d 557, 560 (1st Cir. 1990) (per curiam); *United States v. Silva*, 715 F.2d 43 (2d Cir. 1983); *Lueck v. United States*, 678 F.2d 895, 899 (11th Cir. 1982) ("Because of the overriding power and responsibility of the sovereign to police national borders, the fifth amendment guarantee against self-incrimination is not offended by routine questioning of those seeking entry to the United States."). Stewart and Brown asked Boone about the contents of the box. This was a routine line of questioning, even if the defendant's speech and conduct elicited criminal suspicion. *See id.*; *cf. United States v. Ezeiruaku*, 936 F.2d 136, 140-41 (3rd Cir. 1991) (Aldisert, J.) ("[T]he border search of luggage is "routine" and

requires no degree of suspicion."). The defendant's alleged responses were properly admitted.

Boone's colloquy with Schwartz on the following morning was also properly received in evidence. Schwartz carefully advised Boone of his constitutional rights in the late evening on May 23, 1997. (*See* Tr., Dec. 4, 1997, at 40 ("Because I'm new at this, my supervisor was there watching me, and I was very careful, and it took me about ten, ten minutes to do this, ten, fifteen minutes to do this.").) After the defendant acknowledged the warnings in writing, Schwartz interviewed him. The following morning, he questioned Boone again at the United States Attorney's Office. Although Schwartz did not administer the *Miranda* warnings again, Boone told him before questioning that he remembered his rights and did not want an attorney. Boone then made an inculpatory statement.

Examining the totality of the circumstances surrounding the defendant's alleged waiver of his *Miranda* rights, see *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court finds that Schwartz's failure to re-administer the full warnings did not render Boone's statement inadmissible per se. *See United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995) (holding that failure to repeat warnings did not necessitate suppression); *United States v. Anthony*, 474 F.2d 770, 773 (5th Cir. 1973) ("[T]here is no

requirement that an accused be continually reminded of his rights once he has intelligently waived them."); *see also California v. Prysock*, 453 U.S. 355, 359, 363 (1981) (acknowledging that "Miranda itself indicated that no talismanic incantation was required to satisfy its strictures"). The defendant was painstakingly informed of his rights in the twilight hours of May 23, 1997, and he appeared to understand the warnings. After being allowed to rest, he was then interviewed on the same subject matter by the same interrogator less than twelve hours later. The record does not disclose any intervening event that might have negated the possibility of a knowing, intelligent and voluntary waiver by Boone. Schwartz's failure to repeat the warnings was imprudent considering the possibility that intervening events could have invalidated them, but it does not mandate suppression or exclusion under these circumstances. *See Andaverde,* 64 F.3d at 1313 (citing similar cases in accord); *United States v. Smith*, 679 F. Supp. 410 (D. Del. 1988) (same). The Court properly denied the defendant's motions.

VI. Failure to Instruct Jury on Lesser-Included Offense

Finally, Boone criticizes the Court's refusal to instruct the jury on the crime of "simple" possession of a controlled substance, 21 U.S.C. § 844(a). His counsel argued that simple possession was a lesser offense included in possession of a

controlled substance with intent to distribute. Although the parties contested whether the jury could have reasonably found that the defendant possessed 3954 grams of cocaine for personal use, the Court must give a requested instruction only when "the elements of the lesser offense are a subset of the elements of the greater offense." *See United States v. Mosley*, 126 F.3d 200, 203 (3d Cir. 1997). "This standard involves a textual comparison, looking solely to the elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant." *United States v. Taftsiou*, 144 F.3d 287, 291-92 (3d Cir. 1998) (citation omitted).

Section 844(a) of Title 21, United States Code, defines the crime of simple possession as follows:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III.

21 U.S.C. § 844(a). The statute requires that the government prove that the defendant was not authorized to possess the controlled substance. Since this requirement does not appear in

21 U.S.C. § 841(a)(1),[3] the Court denied the requested instruction. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989) ("Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).").

The Court has since determined that, despite this apparent discrepancy, the Third Circuit Court of Appeals has identified simple possession as a lesser crime included in possession with intent to distribute. *See United States v. Frorup*, 963 F.3d 41, 42 (3d Cir. 1992); *United States v. Ryan*, 866 F.2d 604, 605 (3d Cir. 1989) (in dicta). Numerous circuits share this view. *See United States v. Smith*, 34 F.3d 514 (7th Cir. 1994); *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994); *United States v. Johnson*, 977 F.2d 1360 (10th Cir. 1992); *United States v. Garcia-Duarte*, 718 F.2d 42 (2d Cir. 1983); *United States v. Upthegrove*, 504 F.2d 682 (6th Cir. 1974).

Assuming that the Court erred in refusing to instruct the jury on the lesser included offense of simple possession, this error was harmless because the quantity of cocaine seized was clearly inconsistent with personal use. "Any error . . . which does not affect substantial rights shall be disregarded." FED.

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[3] That statute states that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1).

R. CRIM. P. 52(a). The Supreme Court has ruled that the due process clause requires a lesser included offense instruction where the failure to instruct the jury enhances the risk of an unwarranted conviction in a capital case. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980). In this case, the government presented testimony and physical evidence that Boone brought approximately nine pounds of cocaine to the United States. The defendant was convicted of possession of a controlled substance with intent to distribute after the Court denied his request for an instruction concerning mere possession. This was not a capital case, and the substantial evidence against the defendant diminished the possibility of an unwarranted conviction. Further, if the jury believed that Boone should not have been convicted of possession with intent to distribute, it could have acquitted him on that charge and found him guilty only of possession aboard an aircraft and importation. It is clear that the purported error did not "substantially sway" the jury's judgment. *See Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946). It was "harmless beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For the foregoing reasons, the defendant's motion will be denied. An appropriate Order will issue.

ENTERED this 1st day of December, 1998.

FOR THE COURT:

____/s/_____
Thomas K. Moore
Chief Judge

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